

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.81 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

JAY ENTERPRISES

Versus

COMMISSIONER OF CENTRAL EXCISE

Appearance:

1. TAX APPEAL No. 81 of 2005
MR SN THAKKAR for MR DV PARIKH for Appellant No. 1
MR JITENDRA MALKAN for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 04/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The following substantial question of law was framed at the time of admission of the appeal :

"Whether on the facts and the circumstances of the case, the Customs Excise and Service Tax Appellate Tribunal was justified in law in passing the order dtd.27th December, 2004 without even discussing the contentions raised on behalf of the assessee, without assigning any reasons whatsoever, and could it therefore be termed to be an order within the meaning of Section 35 (C) of the Central Excise Act, 1944?"

2. The appellant, a manufacturer of Paper Based Decorative Laminated Sheets, was exigible to Excise Duty under Tariff Entry 15-A of the Central Excise Tariff Act. The appellant availed of proforma credit under Rule 56-A of the Central Excise Rules which was predecessor Rule of the relevant Rules framed under the MODVAT/CENVAT Scheme. It appears that after 28th February, 1986 a dispute arose between Central Excise Department and the assessees, who were paper manufacturers and in light of such dispute relatable to items which could be included in post manufacturing expenses, a certificate of assessable value was obtained from Range Superintendent certifying the amount of differential duty in respect of consignments sent to the appellant. On the basis of the said certificate the appellant requested the Range Superintendent having jurisdiction over the appellant to allow credit of differential duty amounting to Rs.7,56,706.89. Accordingly, by three separate letters, all dated 5th June, 1987, the appellant was allowed credit of duty amounting to Rs.7,56,706.89.

3. Subsequently, however, by letter dated 12th January, 1988, the Range Superintendent exercising jurisdiction over the appellant, called upon the appellant to pay the aforesaid amount within 10 days since, according to the department, in view of the provisions of MODVAT Scheme, credit of MODVAT and proforma credit were mutually exclusive and the appellant was entitled to benefit only under one of the schemes and not under both. The appellant repaid the aforesaid amount in installments, under protest.

4. By letter dated 13th April, 1998, the appellant requested Assistant Commissioner Central Excise, Rural Division, Ahmedabad to grant cash refund of the aforesaid amount. However, the said claim of refund came to be rejected under Order-in-Original dated 4th September, 1998 for the reasons stated in the said order. The assessee carried the matter in appeal before the Commissioner (Appeals) who, for the reasons recorded in

his order dated 15th February, 2002, dismissed the appeal.

5. The appellant preferred Second Appeal before the Customs, Excise and Gold (Control) Appellate Tribunal ('CEGAT' as it then was). CEGAT posted the appeal for hearing on 19th August, 2004 and 29th September, 2004. As according to the appellant, the issues were concluded in favour of the appellant by different decisions of the Tribunal, written statements were filed on 12th August, 2004 and 18th September, 2004. However, the appeal was adjourned to 17th November, 2004 and hence, on 9th November, 2004 the appellant once again wrote to CEGAT inviting its attention to earlier written submissions. Once again the appeal was adjourned and posted for hearing on 27th December, 2004. In relation to the said hearing also the appellant under covering letter dated 22th December, 2004 once again filed written submissions. The said written submissions have been placed on record by the learned advocate for the appellant. The Tribunal passed an order on 27th December, 2004 and the said order reads as under :

" CORAM

SHRI KRISHNA KUMAR, MEMBER (J)

ORDER NO. A/30/C-IV/WZB/2005/C

Per: Shri Krishna Kumar, Member (J)

1. The appellant has submitted written submission to decide the case on merits.
2. Heard Shri U.H. Jadhav, learned JDR. He reiterated the order of the lower authorities and submitted that the scheme for proforma credit came to amend on 1/3/1986. In the present case, the proforma credit under Rule 56A relates to the period prior to 1986. He submitted that as per CBEC circular no.9/88 CX.6 dated 9.2.1988 since the original credit (i.e. before 1/3/1986) had been taken by the Lamination manufacturers under Rule 56A, the subsequent credit falling under MODVAT Scheme could not be allowed. The provisions of Rule 57E announced in 1987 Budget to allow upward variation of MODVAT credit would also not apply to the present case as the original credit had been taken in Rule 56A. Therefore, the matter having been settled by the said circular is binding on the departmental

officers. He submitted that the appeal is, therefore, devoid of merits and may be dismissed.

3. Appeal is accordingly dismissed.

(Pronounced in Court)

Sd/-

(Krishna Kumar)

Member (J)"

6. Heard Mr.S.N.Thakkar for Mr.D.V.Parikh for the appellant and Mr.Jitendra Malkan for the respondent Revenue. Though various submissions have been made on merits of the controversy between the parties in light of the view that the Court is inclined to take, it is not necessary to set out the said submissions and deal with the same.

7. As can be seen from the impugned order of the Tribunal in Paragraph No.1 the Tribunal takes note of the fact that written submissions have been tendered on behalf of the appellant. In Paragraph No.2 submissions made by Jr.D.R. are reproduced and in Paragraph No.3 the Tribunal states that appeal is accordingly dismissed without either discussing the submissions made on behalf of the appellant or without assigning any reason whatsoever.

8. Under section 35C of the Central Excise Act, 1944 (the Act) CEGAT is required to make an order, after giving the parties to the appeal an opportunity of being heard, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, as the case may be, after taking additional evidence, if necessary. Under sub-section (3) of Section 35C of the Act CEGAT is required to send a copy of every order to the Commissioner of Central Excise and the other party to the appeal. Under sub-Section (4) of Section 35C of the Act the order made by CEGAT shall be final subject to the right of appeal to High Court under Section 35G and right of appeal to Supreme Court under Section 35L of the Act. It is necessary for CEGAT to bear in mind that the proceedings before it are for the purpose of ascertainment and fastening of liability to duty in case of an assessee before it. Any order made by CEGAT would have far reaching implications so far as the financial affairs of an assessee are concerned as well as for the Revenue of the Union Government. This is the reason why CEGAT is required to make a speaking order under Section

35C of the Act; namely, an order which reflects application of mind before any liabilities are fastened against an assessee or where relief is granted against the Revenue.

9. The legal position is well-established and bears no repetition. CEGAT is a quasi-judicial body and it has to bear in mind that the Order-in-Original had merged with the Order-in-Appeal made by the Commissioner (Appeals). CEGAT is required to ensure that it passes an order which is a speaking order, in light of the fact that the said order is an appealable order.

10. In 1959, the Apex Court had observed that if the Tribunal arrives at its own conclusion of fact after due consideration of evidence before it, the Court will not interfere, but for this purpose it was necessary that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its findings in a manner which would clearly indicate what were the points for determination before it, and what was the evidence pro and contra in regard to each of the issues and what were the findings reached on the evidence on record before it. (Omar Salay Mohamed Sait Vs. Commissioner of Income-tax, Madras, [1959] 37 ITR 151). This position has been reiterated once again in 2002 by this Court after referring to the aforesaid judgment in the two decisions rendered in case of Mercury Metals (P) Ltd. Vs. Assistant Commissioner of Income-tax, [2002] 257 ITR 297 and Rameshchandra M. Luthra Vs. Assistant Commissioner of Income-tax, [2002] 257 ITR 460. The Tribunal has passed the order on 27th December, 2004 and yet seems to be blissfully unaware of the legal position.

11. It is necessary for CEGAT to assign reasons while disposing of an appeal before it. Reasons are the soul of the proceedings including the order of CEGAT and in absence of the same the order remains merely a shell without any substance. It is not necessary that CEGAT pass an elaborate order, but at the same time the body of the order must reflect that CEGAT is aware of the aforestated legal position and the order, when read as a whole, must reflect application of mind. It is for this purpose that reasons are required to be assigned, howsoever brief they may be.

12. Admittedly, as can be seen from the impugned order, on application of the aforesaid legal position, the order made by CEGAT fails to satisfy the legal

parameters of a valid order and hence, is required to be quashed and set aside. The learned counsel for Revenue made a faint attempt to justify the same but was not in a position to dispute the fact that the impugned order was not in accordance with law.

13. In the circumstances, the question posed for consideration is required to be answered in the negative. CEGAT was not justified in law in passing the impugned order dated 27th December, 2004 without discussing the contentions raised on behalf of the assessee and without assigning any reason whatsoever. In the circumstances, the impugned order cannot be termed to be an order within the meaning of Section 35C of the Act. The order No.A/30/C-IV/WZB/2005/C dated 27th December, 2004 made by CEGAT is hereby quashed and set aside and the appeal bearing No.E/1035/02 is restored to file. CEGAT shall give adequate and reasonable opportunity to both the sides and after hearing the parties, if they so desire, dispose of the appeal in accordance with law.

The appeal is, accordingly, allowed. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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'Bhavesh'